SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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April 20, 2015

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RE: *Toelle v. Greenpoint Mortgage Funding, Inc., et al.*
C.A. No. S14C-05-035
This is a Corrected Order from the March 17, 2015 Signed Order

Dear Parties:

Before the Court is US Bank, N.A.'s ("US Bank"),[1] DLJ Mortgage Capital, Inc.'s, Credit Suisse First Boston Mortgage Securities Corporation's, Mortgage Electronic Registration Systems, Inc.'s ("MERS"), and Select Portfolio Servicing, Inc.'s ("SPS") (collectively the "Defendants") Motion to Dismiss pursuant to Delaware Civil Rule 12(b)(6) as to all ten of Scott and Carol Toelle's ("Plaintiffs") claims.[2] Based on the following the Court **GRANTS** the Defendants' motion to

[1] US Bank, N.A. is the Trustee for Securitized Trust CSFB Mortgage-Backed Pass-Through Certificates, Series 2001-11.

[2] Plaintiffs assert ten causes of action: (1) lack of standing/wrongful disclosure; (2) fraud in the concealment; (3) fraud in the inducement; (4) slander of title; (5) quiet title; (6) declaratory relief; (7) violation of the Truth in Lending Act ("TILA"); (8) violation of the Real Estate Settlement Procedures Act ("RESPA"); (9) Contractual rescission; and (10) Intentional Infliction of Emotional Distress ("IIED"). All ten causes of action stem from Plaintiffs belief that the securitization of their loan renders the loan unenforceable.

dismiss all ten of Plaintiffs' causes of action.

Facts

On June 16, 2000, Plaintiffs executed a promissory note ("Note") memorializing they borrowed a $400,000 loan from Greenpoint Mortgage Funding, Inc. ("Greenpoint").[3] The Note was secured by a mortgage ("Mortgage"), recorded in the Register of Deeds of Sussex County, Delaware. Defendant MERS, as nominee for Greenpoint, its successor and assigns, was named as the mortgagee.

In September 2010, MERS recorded an assignment of the Note, and the related mortgage, to US Bank. In July 2013, Plaintiffs defaulted on loan payments. When Plaintiffs defaulted, their loan servicer, Defendant SPS, notified Plaintiffs. Plaintiffs acknowledge they received SPS's notice. Currently, there is no foreclosure action pending against Plaintiffs.

On May 31, 2014, Plaintiffs filed their complaint against the Defendants[4] asserting not only that the Mortgage and Note are not enforceable, but also that Defendants owe Plaintiffs damages. Subsequently, Defendants filed the instant motion to dismiss.

Standard of Review

The standards for a Rule 12(b)(6) motion to dismiss in Delaware are clearly defined. The Court must accept all well pled allegations as true.[5] "The Court must then determine whether a plaintiff may recover under any reasonable set of circumstances that are susceptible of proof."[6]

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[3] Greenpoint was the original lender (originator).

[4] Plaintiffs filed suit against several other entities other than Defendants. The Court recently dismissed Plaintiffs' claims against these other entities due to Plaintiffs' failure to provide service to them.

[5] *Magnolia's at Bethany, LLC v. Artesian Consulting Engineers, Inc.*, 2011 WL 4826106, *2 (Del. Super. Sept. 19, 2011) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

[6] *Id.*

Dismissal will not be granted if the complaint "gives general notice as to the nature of the claim asserted against the defendant."[7] "A claim will not be dismissed unless it is clearly without merit, which may be either a matter of law or fact."[8] Vagueness or lack of detail in the pleaded claim are insufficient grounds upon which to dismiss a complaint under Rule 12(b)(6).[9] If there is a basis upon which the plaintiff may recover, the motion is denied.[10]

Discussion

In order to understand the relationship between a promissory note, a negotiable instrument under Article III of the Delaware Uniform Commercial Code ("DUCC"), and a mortgage,[11] as well as how the process of securitization affects them, the Court believes an analysis of the note-mortgage-securitization process is necessary. This discussion is a soup-to-nuts exegesis of the mortgage process, and how mortgages may be converted into securities.

Loan Process

In a typical home finance scenario, the lender extends credit to the debtor in exchange for the debtor's promise, memorialized by a promissory note, to repay the principal and interest on the loan.[12] A note represents the debt a debtor owes a lender, while a mortgage is "a conveyance of an estate, by way of pledge for the security of debt, [which becomes] void on payment of it."[13] Without

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[7] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

[8] *Id.*

[9] *Magnolia's at Bethany*, 2011 WL 4826106 at *2 (citing *Diamond State*, 269 A.2d at 58).

[10] *Id.*

[11] 25 *Del. C.* § 2101.

[12] *Pension Trust Fund for Operating Engineers v. Mortgage Asset Securitization Transactions, Inc.*, 730 F.3d 263, 265 (3rd Cir. 2013).

[13] *Handler Construction, Inc. v. Corestates Bank, N.A.*, 633 A.2d 356, 363 (Del. 1993) (quoting 4 Kent, Commentaries on American Law *135).

a mortgage to back it up, a promissory note is nothing more than "a mere unsecured promise to pay."[14] Thus, "the borrower signs a debt instrument in the form of a promissory note reflecting the debt, and . . . separately executes a mortgage that secures the debt by creating a lien against the home."[15] By the mortgage, the mortgagor binds his land specified in the mortgage agreement and obligates to pay a certain sum of money.[16] If the mortgagor fails to keep the covenant contained in the mortgage, the mortgagee, who is usually the lender, is entitled to recover upon the obligation in accordance with the mortgage agreement's terms.[17]

Legal and Beneficial Interests of a Loan

A mortgage loan requires the execution of two separate, but intimately related contracts: a promissory note and a mortgage.[18] "The note embodies the borrower's promise to repay the lender (or in its stead, the noteholder),"[19] while the mortgage, in a lien state such as Delaware,[20] is nothing more than a lien allowing the lender to look to the property to satisfy the debt in the event of

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[14] *Highlights for Children, Inc. v. Crown*, 227 A.2d 118, 120 (Del. Ch. 1966).

[15] *Quadrant Structured Products Company, Ltd. v. Vertin*, 2013 WL 3233130, *7 (Del. Ch. Jun. 20, 2013) (citing *1 Mortgages and Mortgage Foreclosure in N.Y.* § 4:8 (2012)).

[16] *Borders v. Townsend Associates*, 2002 WL 725266, *5, fn 3 (Del. Super. Apr. 17, 2002) (quoting Woolley on Del. Practice, Vol. 2, *Scire Facias* §1358 (1906)) (typically the amount borrowed plus interest and any additional fees or costs).

[17] *Id.* (Usually by filing a foreclosure action in either the Court of Chancery or Superior Court).

[18] *Culhane v. Aurora Loan Services of Nebraska*, 708 F.3d 282, 292 (1st Cir. 2013) (citing *Easton v. Fed. Nat'l Mortgage Ass'n*, 969 N.E.2d 1118, 1124 (Mass. 2012)).

[19] *Id.*

[20] *In re Agostini*, 33 A.2d 306, 309 (Del. Super. 1943) ("Many of the American jurisdictions have rejected the common law theory of a mortgage as a conveyance of title, and treat a mortgage as being merely a security for the payment of the debt, the title remaining in the mortgagor as if the mortgage had not been given. Delaware is among these jurisdictions.")

default.[21] These two contracts separate the legal interest in the mortgage from the beneficial interest in the underlying debt memorialized by the note.[22] Though a note and its related mortgage are most often held by the same entity because "[l]ogically, the right to enforce a mortgage would have to be based on ownership of the underlying debt,"[23] "there is no technical reason why the interests [cannot] be separated in one way or another."[24] Thus, a mortgagee may assign its mortgage to another party, and a noteholder may freely transfer its note as well.[25] As such, it is irrelevant who owns or has an interest in the note or mortgage as long as it does not affect the debtor's ability to make payments.[26]

The Delaware Uniform Commercial Code

Negotiable Instruments Under the Delaware Uniform Commercial Code

Under the DUCC, the person who signs or is identified in a note as a person undertaking to pay is known as the "maker."[27] The term "promise" refers to a written undertaking to pay money signed by the person undertaking to pay.[28] Further, a "negotiable instrument" is defined as:

> [A]n unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise . . . if it: (1) [i]s payable to bearor or to order at the time it is issued or first comes into possession of a holder; (2) [i]s payable on demand or at a definite time; and (3) [d]oes not state any other undertaking or instruction by the [maker] to do any act in addition to the payment of

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[21] *Ciconte v. Barba*, 161 A. 925, 926 (Del. Ch. 1932).

[22] *Culhane*, 708 F.3d at 292.

[23] *Bank of New York v. Raftogianis*, 13 A.3d 435, 448 (N.J. Ch. 2010).

[24] *Id.* (Though the two types of interests associated with a mortgage loan are related, they are also distinct in that one is a beneficial interest (the note) and the other is a legal interest in a property right (the mortgage). As such, both types of interests can be owned by two separate entities, similar to how a trust functions.)

[25] *Culhane*, 708 F.3d at 292 (citing U.C.C. §§ 3–205, 3–301).

[26] *See In re Veal*,450 B.R. 897, 912 (9th Cir. 2011).

[27] 6 *Del. C.* §3-103 (a)(5).

[28] 6 *Del. C.* §3-103 (a)(9).

> money, but the promise . . . may contain (i) an undertaking or power to give . . . collateral to secure payment . . . .[29]

A promissory note is a negotiable instrument because it is a promise to pay a specified amount.[30]

Transfers, Negotiations, and Persons Entitled to Enforce an Instrument

The DUCC defines negotiation as "a transfer of possession, whether voluntary or involuntary . . . ."[31] "If an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder."[32] The DUCC also notes "an instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving the person receiving delivery the right to enforce the instrument."[33] "Transfer of an instrument, whether or not . . . [by] negotiation, vests in the transferee *any* right of the transferor to enforce the instrument (emphasis added) . . . ."[34] Thus, the person entitled to enforce an instrument is: (1) the holder of the instrument;[35] (2) a nonholder in possession of the instrument who has the rights of a holder; or (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d).[36]

Because a promissory note is a negotiable instrument under DUCC, it can be transferred

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[29] 6 *Del. C.* §3-104 (a)(1)-(3).

[30] 6 *Del. C.* §3-104 (e).

[31] 6 *Del. C.* §3-201 (a)-(b).

[32] *Id.*

[33] 6 *Del. C.* §3-203 (a)-(b).

[34] *Id.*

[35] "Holder" is defined as "the person in possession of a negotiable instrument that is payable either to bearor or to an identified person that is the person in possession . . . ." 6 *Del. C.* §1-201 (21)(a).

[36] 6 *Del. C.* §3-301.

freely to another entity via negotiation. Therefore, a transferee of a note can enforce it against a debtor.[37] Based on contract principals, if a debtor is not a party to a transfer, not a third party beneficiary, or cannot show it sustained some type of legal harm as a result of the transfer, it does not have standing to challenge the transfer or enforcement of the note.[38]

Securitization

Securitization is the process of pooling financial assets, such as loans, to create an investment instrument, i.e. a security.[39] The process by which these mortgage-backed securities come into existence is relatively complicated, but has existed in this country for over a hundred years.[40] Generally, one or more lenders sell substantial numbers of notes they have issued to a pool or trust.[41] The notes are then consolidated into a single debt instrument.[42] Interests in the pool or trust are then sold to investors, who receive certificates entitling them to share in the funds received as the underlying loans are repaid.[43] The transfers and sales of these notes can occur multiple times and

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[37] *See In re Walker*, 446 B.R. 271, 282 (Bankr. E.D. Pa. 2012); *Citimortgage, Inc. v. Trader*, 2011 WL 3568180, *1 (Del. Super. May 13, 2011) (citing 10 *Del. C.* §5061(a)) ("Delaware law specifically provides that an assignee of a mortgagee's interest has standing to bring a foreclosure action.")

[38] *See Branch Banking and Trust Co. v. Eid*, 2013 WL 3353846, *3 (Del. Super. Jun. 13, 2013); *CitiMortgage, Inc. v. Bishop*, 2013 WL 1143670 (Del. Super Mar. 4, 2013).

[39] *Culhane*, 708 F.3d at 295, fn 1.

[40] *Raftogianis*, 13 A.3d at 441 ("The securitization of mortgages has a long and somewhat involved history in this country, dating back to the nineteenth century. More recently, the federal government became involved in various forms of securitization through . . . 'Fannie Mae' and . . . 'Ginnie Mae.' Private institutions became more involved in securitization of mortgages . . . in the 1970s. Overtime the structuring and issuance of private mortgage-based securities became much more complex and widespread, contributing to the recent crisis in the financial markets.")

[41] *Id.*

[42] *Culhane*, 708 F.3d at 295, fn 1.

[43] *Raftogianis*, 13 A.3d at 441; *Chase Manhattan Mortg. Corp. v. Advanta Corp.*, 2005 WL 2234608, *1 (D. Del. Sept. 8, 2005) ("In a . . . mortgage securitization, a number of mortgage loans are pooled together and sold into a trust by an 'originator.' Interests in the trust are in turn sold to investors . . . . The cash from the [investors] goes to the originator, and the originator can then use that cash to originate more loans. The [investors] receive

without any notice to the debtor-mortgagor.[44]

The consolidation of several loans into a single debt instrument is accomplished through various interrelated contracts. Typically, a Pooling and Servicing Agreement ("PSA") is among them.[45] PSAs set forth the rights and obligations of the participants in the securitization, and are crafted to ensure that the benefits of the securitization flow into the trusts.[46] Numerous courts have found that a debtor lacks standing to challenge a securitized trust's authority to enforce a loan and mortgage based on purported violations of the relevant PSA.[47] As explained in *In re Walker*:

> [A] judicial consensus has developed holding that a borrower lacks standing to (1) challenge the validity of the mortgage securitization or (2) request a judicial determination that a loan assignment is invalid due to noncompliance with a [PSA], when the borrower is neither a party nor a third party beneficiary of the securitization agreement.[48]

Thus, absent a violation of the PSA affecting a debtor's ability to pay on the underlying loan, or the debtor being named a third party beneficiary to the PSA, the debtor lacks standing to contest the validity of an assignment of its note on the grounds that the PSA's terms were not followed by the parties involved in the transfer.[49]

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monthly payments, constituting a pay down of their principal investment and interest on the investment.")

[44] *See Raftogianis*, 13 A.3d at 441; *Culhane*, 708 F.3d at 292; *Byrd v. Meridian Foreclosure Service*, 2011 WL 1362135 (D. Nev. Apr. 8, 2011); *Coleman v. American Home Mortgage Servicing, Inc.*, 2011 WL 6131309, at *4 (D. Nev. Dec. 8, 2011).

[45] *Chase Manhattan Mortg. Corp. v. Advanta Corp.*, 2005 WL2234608, *1.

[46] *Chase Manhattan Mortg. Corp.*, 2005 WL2234608, *1; *County of Washington, Pa. v. U.S. Bank Nat. Ass'n*, 2012 WL 3860474, *3 (W.D. Pa. Aug. 17, 2012).

[47] *Walker*, 466 B.R. at 284-85 (Many cases have arisen out of the same circumstances present in the instant case, i.e. the debtor initiated a lawsuit against the mortgagee seeking a determination that it lacked authority to enforce the subject note and mortgage).

[48] *Id.* at 285.

[49] *Id.* at 286.

MERS

MERS was formed by a consortium of residential mortgage lenders and investors to streamline the process of transferring ownership of mortgage notes to make the securitization process more efficient.[50] "MERS is a private corporation which administers a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans."[51] Lenders may become a member of MERS by paying an annual fee and agreeing to the corporation's terms and conditions.[52]

When mortgage loans are initially placed, member lenders will retain the underlying notes, but can arrange for MERS to be designated as the mortgagee on the mortgages backing the notes.[53] This allows lenders to freely transfer their notes to other members of MERS via an assignment,[54] without having to subsequently record the transfer of their interests in the mortgages backing the notes.[55] However, the creation of MERS has made it difficult for mortgagors to identify the entity that actually controls their debt at any given time.[56]

MERS's status as the entity owning the legal interest is the debtor's property is limited however. MERS "acts solely as a 'nominee' for the owner or servicer of the mortgage, including

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[50] *Culhane,* 708 F.3d at 287 (citation omitted).

[51] *Raftogianis*, 13 A.3d at 440.

[52] *Id.*

[53] *Raftogianis*, 13 A.3d at 440; *Culhane*, 708 F.3d at 287.

[54] *See* 6 *Del. C.* §§ 3-201, 3-203

[55] *Raftogianis*, 13 A.3d at 440-41 (citing *Mortgage Elec. Registration Sys., Inc. v. NE Dep't Banking*, 704 N.W.2d 784 (Neb. 2005)) (This process allows lenders to avoid paying filing fees that might otherwise be required for an assignment of an interest in a mortgage).

[56] *Id.* at 441 (citing *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 168 (Kan. 2009)).

the owner's or servicer's successors and assigns."[57] This means that MERS holds *only* the legal interest in the mortgage, but does not have a beneficial interest in it,[58] making the relationship between the members and MERS one based on agency principals (emphasis added).[59] The relationship that MERS has to [its members] is more akin to that of a straw man than to a party possessing all the rights given a buyer."[60] As such, "MERS, as nominee, does not have any real interest in the underlying debt, or the mortgage which secured that debt. It acts simply as an agent or 'straw man' for the lender."[61]

With that said, "Delaware Courts have shown little appetite for invalidating mortgage assignments merely because they were assigned by MERS."[62]

Application

Virtually all of Plaintiffs' causes of action are related to their assertion that the securitization process render's their Note unenforceable. As explained in depth above, securitization is widely accepted as a legal activity that does not render a loan unenforceable.

Claim I

Plaintiffs first assert the Defendants do not have standing to foreclose on their property and that any future foreclosure is wrongful. As explained above, it is well settled law that a mortgagor does not have standing to contest the assignment and transfer of its mortgage note because a

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[57] *Culhane*, 708 F.3d at 287.

[58] *Id.* (Thus, conceptually, MERS is really acting as a trustee for all of its members in holding their mortgages).

[59] *Raftogianis*, 13 A.3d at 449.

[60] *Id.* (quoting *Landmark*, 216 P.3d at 166).

[61] *Id.*

[62] *Eid*, 2013 WL 3353846 at *3.

mortgagor is not a party to the transfer and assignment, and in the case of a PSA is not a party to the contract. Therefore, it is not the Defendants that lack standing[63] with regard to the securitization issue, but rather Plaintiffs.[64] Further, even if Delaware recognized the tort of wrongful foreclosure, no injury has actually occurred, nor is imminent, as there is no pending foreclosure action that would make this first claim ripe. As such, the Defendants' motion to dismiss is **GRANTED** as to Claim I.

Claims II and III

Plaintiffs argue both fraud in the concealment[65] and fraud in the inducement.[66] These claims require Plaintiffs prove the Defendants deliberately concealed that securitization was possible, or that the Defendants made false statements with regard to securitization and the ability to transfer interest in the Note. The record indicates Greenpoint, the originator of the loan, specifically included clauses in the Note and Mortgage documents explaining that securitization was possible. Section 1 of the Note states, "I understand that [Greenpoint] may transfer this Note. [Greenpoint] or anyone who

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[63] The Court points out that some of the Defendants, based on their relationship to the Note and Mortgage, may not have standing to foreclose on the property. However, Plaintiffs have not identified specifically which Defendants that might be and only makes a blanket assertion that all the Defendants lack standing, which is simply not true.

[64] To establish standing in Delaware, the plaintiff must, among other things, show an actual or imminent injury. *See Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003); *Walker*, 466 B.R. at 284 (rejecting a debtor's ability to contest foreclosure due to the transferor and transferee of a note not following the PSA).

[65] Fraud in the concealment requires a plaintiff prove: (1) deliberate concealment by the defendant of a material fact, or silence in the face of a duty to speak; (2) that the defendant acted with scienter; (3) an intent to induce plaintiff's reliance upon the concealment; (4) causation; and (5) damages due to the concealment. *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987).

[66] Fraud in the inducement requires a plaintiff prove: (1) the defendant made a false statement or representation; (2) the defendant had knowledge that the statement was false, or made a statement with a reckless indifference as to its truth; (3) the defendant intended to induce the plaintiff into action; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered damages. *Corkscrew Mon. Ventures, Ltd. v. Preferred Real Estate Investments, Inc.*, 2011 WL 704470, *4 (Del. Ch. Feb. 28, 2011).

takes this Note by transfer and who is entitled to receive payments under this Note is called the Note Holder."[67] Section 20 of the Mortgage states, "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower."[68] Based on these facts, there was no concealment and there were no false statements to mislead Plaintiffs with regard to securitization. Likewise, there was no concealment or false statements explaining to Plaintiffs which entity they needed to make payments to, as SPS was servicing their loan and contacted them regarding both the loan transfer and their 2013 default. As such, Plaintiffs cannot factually establish elements of its two fraud claims. Therefore, Claims II and III are **DISMISSED**.

Claim IV

Plaintiffs also maintain a Slander of Title[69] cause of action in connection with the assignment of the Mortgage and other "undisclosed documents." As stated above, Plaintiffs lack standing to challenge the assignment of their Note to US Bank. However, assuming *arguendo* that Plaintiffs had standing, Plaintiffs are still unable to make out a viable slander of title claim. Maliciousness, an element of slander of title, requires that the Defendants acted with a wrongful or improper motive or with a wonton disregard of the Plaintiffs' rights.[70] However, Plaintiffs have failed to allege any type of malicious intent by any of the Defendants, and seem only to rely on some notion that mere securitization is sufficient to evidence a malicious mental state on the part of the parties involved

[67] Def. App. p. 17.

[68] Def. App. p. 31.

[69] Slander of title requires a plaintiff to establish that the defendant maliciously published a false matter concerning the title of property which caused the plaintiff special damages. *Rudnitsky v. Rudnitsky*, 2000 WL 1724234, *12 (Del. Ch. Nov. 14, 2000).

[70] *U.S. Bank Nat'l Ass'n v. Gunn*, 2014 WL 1247085, *6 (D. Del. Mar. 25, 2014).

in the transfer and assignment of the Note. Thus, Claim IV is **DISMISSED**.

Claim V

Next, Plaintiffs seek quiet title[71] of the collateralized property in their favor. However, Plaintiffs are unable to prove that they have superior title to the property. They admit in their complaint that they encumbered their property with a mortgage in favor of MERS in order to secure the $400,000 loan they received from Greenpoint. Plaintiffs have not alleged they have paid off the loan, but rather claim that the loan is now unenforceable because it was securitized. As stated above, securitization is widely accepted in the courts, and does not invalidate a mortgage or the note it secures. Plaintiffs have not shown how they have superior title to the property, which requires the Court to **GRANT** the Defendants' motion as to Claim V.

Claim VI

Additionally, Plaintiffs seek a declaratory judgment[72] to determine who is entitled to enforce the Note and Mortgage, the validity of the assignment of the Note, and who owns the property in fee simple. The issues here are not ripe for review. First, a determination as to who is entitled to enforce the Note and Mortgage is not ripe because Plaintiffs lack standing to address the assignment and transfer of their Note. Second, a determination as to who owns the property in fee simple is not ripe since there is no foreclosure action currently pending. Therefore, the Defendants' motion to dismiss

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[71] In Delaware, a plaintiff seeking to quiet title property must show that he has superior title over the defendant with regard to the property at issue. *See Marvel v. Barley Mill Rd. Homes*, 104 A.2d 903, 911 (Del. Ch. 1954).

[72] Superior Court is authorized to entertain an action for a declaratory judgment if an *actual controversy* exists between the parties (emphasis added). An actual controversy requires: (1) that the controversy involve the rights or other legal relations of the party seeking relief; (2) the claim of right or other legal interest be asserted against one who has an interest in contesting the claim; (3) the parties in the dispute have both real and adverse interests; and (4) the issue be ripe for review. *XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014).

as to Claim VI is **GRANTED** due to lack of an actual controversy.

Claim VII and IX

Plaintiffs' Claims VII and IX both relate to the TILA. Claim VII states Defendants violated the TILA by failing to disclose information regarding the Note and its transfer to US Bank, while Claim IX alleges Plaintiffs are entitled to rescind the Note. Both these claims are without merit. The TILA was created to "assure a meaningful disclosure of credit terms so that . . . consumer[s] will be able to compare more readily the various credit terms available to [them] and avoid the uninformed use of credit."[73] A consumer has an absolute right to rescind the loan agreement for three business days after closing on the loan.[74] If a lender fails to make the required disclosures before the loan is initiated, the three day restriction on the right of the rescission is tolled[75] and, a consumer has until three days after he receives the last of the required disclosures to rescind the loan agreement.[76] The right can only be exercised up to three years after the consummation of the loan, or upon the sale of the encumbered property, whichever occurs first.[77]

First, Plaintiffs have not plead a TILA violation because all of the required disclosures were given when they consummated the loan with Greenpoint. As stated above, Section 1 of the Note

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[73] *Sherzer v. Homestar Mortgage Services*, 707 F.3d 255, 256 (3rd Cir. 2013) (citing 15 *U.S.C.A.* §1601(a)).

[74] 15 *U.S.C.A.* §1635 (a) ("[I]n the case of any consumer credit transaction . . . in which a security interest . . . is or will be . . . acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required . . . together with a statement containing material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so.").

[75] *Sherzer*, 707 F.3d at 256.

[76] 15 *U.S.C.A.* §1635 (a).

[77] *See* 15 *U.S.C.A.* §1635(f).

explains that Greenpoint could transfer the Note at any time without notice to Plaintiffs. As long as Plaintiffs were aware of the possibility of a transfer, the required disclosures were made under the TILA. Because Plaintiffs signed the Note, they are presumed to have had knowledge of the possibility of a transfer at the time the Note was consummated.[78]

Second, even if Plaintiffs had pled an adequate TILA claim, they are time barred from asserting such a claim under 15 *U.S.C.A.* §1635(f). Plaintiffs executed their promissory note in June of 2000. Plaintiffs asserted a violation of the TILA in May 2014. Because Plaintiffs filed their TILA claim 11 years beyond 15 *U.S.C.A.* §1635(f)'s statute of limitations date, they are unable to assert that the Defendants violated the TILA.[79] Plaintiffs have failed to sufficient plead a TILA cause of action, and the statute of limitations for such a violation has elapsed. Claims VII and IX are therefore **DISMISSED**.

Claim VIII

Plaintiffs next claim Defendants violated RESPA. RESPA "regulates the market for real estate 'settlement services,' . . . [which] include 'any service provided in connection with a real estate settlement,' such as . . . the origination of a federally related mortgage loan . . ., and the handling of the processing, and closing or settlement."[80] The primary purpose of RESPA is to protect home buyers from material nondisclosures in settlement statements and abusive practices in

[78] *See Pellaton v. Bank of New York*, 592 A.2d 473, 476-77 (Del. 1991).

[79] Note that US Bank was not a party to the initial loan agreement between Greenpoint and Plaintiffs and thus could not have provided the adequate disclosures necessary within the statute of limitations period since US Bank did not acquire the Note until 2010.

[80] *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2037 (2012) (citing 12 *U.S.C.A.* §2602(3)).

the settlement process, including the servicing of federally related mortgage loans.[81] 12 *U.S.C.A.* §2605 states:

> [e]ach person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

12 *U.S.C.A.* §2607 mandates that any fees charged to the borrowers be actually related to the services provided, while 12 *U.S.C.A.* §2614 ("Anti-Kickback" provision) prohibits the payment of unearned fees. However, an Anti-Kickback claim must be brought within one year of the alleged violation.[82]

Plaintiffs state the Defendants failed to make "disclosures of additional income due to interest rate increases, Notices of Transfers of Servicing Rights, or the proper form and procedure in relation to the Borrower's Right to Cancel." However, under RESPA, the only disclosure that was required to be given Plaintiffs was a notice of transfer of servicing rights.[83] Disclosures of additional income due to interest rates is not required, let alone referenced, under RESPA. The "Borrower's Right to Cancel" refers to the TILA's right of rescission. Such a right is not covered under RESPA. Although notices of transfer of servicing rights are required, US Bank was not servicing Plaintiffs' loan. US Bank is a trustee for a trust that merely owns Plaintiffs' promissory note. Defendant SPS is Plaintiffs' loan servicer, an entity whom Plaintiffs acknowledge they received notifications from.

Plaintiffs also cannot receive any recourse through an Anti-Kickback claim because such a

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[81] *Geham v. Argent Mortg. Co. LLC*, 726 F. Supp. 2d 533, 540 (E.D. Pa. 2010) (citing *Jones v. Select Portfolio Servicing, Inc.*, 2008 WL 1820935, *9 (E.D. Pa. Apr. 22, 2008)).

[82] 12 *U.S.C.A.* §2614.

[83] 12 *U.S.C.A.* §2605.

claim is time barred. The alleged violations occurred either in 2000 or 2010 (upon the transfer of the Note to US Bank). Plaintiffs did not assert their Anti-Kickback claim until May of 2014, well passed the one year statute of limitations. As such, it is time-barred, and thus **DISMISSED**.

Claim X

Lastly, Plaintiffs assert a IIED[84] claim against Defendants. In order to establish an IIED claim, the defendant must have engaged in conduct "so outrageous in character . . . as to go beyond all possible pounds of decency . . . ."[85] Jurisdictions that have addressed similar cases have found that enforcement of a security agreement is typically not considered extreme and outrageous conduct for establishing an IIED claim.[86]

Plaintiffs' claim fails for two reasons. First, the issue is not ripe because, Defendants have not attempted to foreclose the property, the only action which could even remotely be interpreted as extreme and outrageous for establishing this IIED claim. As of this point, the only action that has occurred with regard to the Note is securitization, which, as stated above, is a legal practice. Second, even if the issue was ripe and one of the Defendants with standing had initiated a writ of *scire facias sur mortgage*, courts that have addressed the issue have found that foreclosure of a mortgage is not extreme and outrageous conduct. Under the facts of the case, Plaintiffs did not sufficiently pled an IIED claim, and thus Claim X is **DISMISSED**.

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[84] IIED requires a plaintiff to establish Defendant: (1) intentionally or recklessly; (2) engaged in extreme and outrageous conduct; and (3) the conduct caused severe emotional distress to the plaintiff. *See Lee ex rel. B.L. v. Picture People, Inc.*, 2012 WL 1415471, *4 (Del. Super. Mar. 19, 2012).

[85] *Lee*, 2012 WL 1415471 at *4.

[86] *See, e.g., Brown v. Udren Law Offices PC*, 2011 WL 4011411, *4 (E.D. Pa. Sept. 9, 2011); *Messer v. First Fin. Fed. Credit Union of Md.*, 2012 WL 3104604, *3 (E.D. Pa. Jul. 30, 2012).

Conclusion

Based on the above, Defendants' motion to dismiss is **GRANTED** as to all of Plaintiffs' claims.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves